Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1995

RICHARD FREDERICKS,
Petitioner,

v.

GARY WRIGHT; GEORGE BURKE; CITY OF FOREST GROVE and JOHN DOE, a fictitious person.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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April 1995

Question Presented

Whether the Fourteenth and Fourth Amendments, as construed in Illinois v. Rodriguez, 397 U.S. 177 (1990) and Payton v. New York, 445 U.S. 573 (1980), require that a police officer, seeking consent to enter a residence to make an arrest without warrant make some inquiry of the consenter's identity, relationship to the arrestee-householder and/or other authority to consent where the consenter does not volunteer such information?

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Petition for a Writ of Certiorari

Petitioner respectfully prays that the Court will issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

Opinion Below

The opinion of the United States Court of Appeals for the Ninth Circuit is unreported, but is set forth in the Appendix at A-1, et seq.

Jurisdiction

The United States Court of Appeals for the Ninth Circuit is the highest court other than the Supreme Court of the United States in which review may be had in this case. The jurisdiction of this court is based upon 28 U.S.C. § 1254(1).

The effective date of the appellate judgment was January 20, 1995. This petition is filed within 90 days of that date. Rules of the Supreme Court 13.1.

Constitutional Provisions Involved

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, as follows:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

The Fourth Amendment to the United States Constitution provides, in pertinent

part, as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

Statement of the Case

Petitioner brought this 42 U.S.C. § 1983 action against Gary Wright and George Burke, police officers of the City of Forest Grove, Oregon; the City of Forest Grove itself; and one "John Doe" defendant, a third Forest Grove police officer, subsequently identified as officer Dunlap. The United States District Court for the District of Oregon granted all Defendants' Motion for Summary Judgment against Plaintiff on the basis that the officers and the city enjoyed qualified immunity because the officers did not violate any clearly established constitutional rights of which a reasonable person would have known. The Circuit Court for the Ninth Circuit affirmed in an unpublished opinion which appears at A-1, et seq.

The facts, summarized from the opinion of the Circuit Court of Appeals are as follows:

On the evening of March 21, 1992, officers Burke and Wright and a third officer whose name is unknown, all in uniform, went to the home of petitioner Fredericks, whom at least Burke and Wright knew on sight, intending to arrest him

without warrant, on felony charges.[1] The Court of Appeals noted that although there was a factual dispute about what happened next,

> * * * it did not create a genuine issue of material fact because no violation of a clearly established right occurred under either scenario. Fredericks v. Wright, et al., No. 94-35494, A-5.

Only one version of the facts, the so-called "foyer" version given largely in officer Burke's deposition, will be given here because if this court agrees that it does present a violation of a clearly established right, petitioner is entitled to reversal of the order granting summary judgment and the opportunity to see whether a jury would accept that version rather than the other.

According to officer Burke, he knocked on the door of Fredericks' home. Fredericks' friend and dinner guest, Thompson, answered the door and Burke asked if the officers (who were visible through the door's glass) could come in. Thompson said they could. Once inside, Burke asked if Fredericks was there, but before Thompson could answer, Fredericks appeared and asked, "How can I help you?" Burke then placed him under arrest.

While being placed under arrest,

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[1] All charges were dismissed with prejudice and the record expunged.

Fredericks asked Burke if he possessed a warrant. Burke stated that he did not need a warrant.[2] There was no exigency.

Reasons for Granting the Writ

Illinois v. Rodriguez, 497 U.S. 177, 189 (1990), holds that where an officer relies upon the "apparent authority" of one on the premises to consent to the officers' entry to effect a warrantless arrest or search, the officer must make some reasonable inquiry into the consenter's authority and/or relationship to the occupant unless that authority is patent. In this case, the United States Court of Appeals for the Ninth Circuit held no such inquiry necessary even where the consenter's only "apparent authority" is (a) his presence at the door, and (b) his invitation to enter. This places the Court of Appeals for the Ninth Circuit in conflict with its sister Courts of Appeal for the Second Circuit (United States v. Brown, 961 F.2d 1039 (C.A.2 1992)), Sixth Circuit (United States v. Hall, 979 F.2d 77 (C.A.2 1992)), and Tenth Circuit (United States v. Whitfield, 939 F.2d 1071 (C.A.D.C. 1991), as well as in arguable conflict with its own pre-Illinois v. Rodriguez, 397 U.S. 177 (1990), cases requiring such inquiry where the consenter's authority was ambiguous (United States v. Hamilton, 792 F.2d 837 (C.A.9 1986) and United States v. Sledge, 650 F.2d 1075 (C.A.9 1981), per then-Circuit Judge Kennedy).

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[2] Telephone warrants are available. During depositions, officer Burke stated that their policy was not to secure telephonic warrants.

Before Illinois v. Rodriguez, supra, consent to enter a residence by a guest or brief visitor in the home, given to a uniformed police officer to arrest or search without warrant (although with probable cause) was generally not allowed by the Federal Courts. United States v. Mahoney, 712 F.2d 956 (C.A.5, 1983), cert. den., 486 U.S. 1220 (1984) (Brennan and Marshall, JJ., dissenting) (applied "good faith" exception to officer's mistaken belief that consent was valid); United States v. Harris, 534 F.2d 95 (C.A.7, 1976); but cf., United States v. Turbyfill, 525 F.2d 57 (C.A.8, 1975) (long term visitor's wordless opening of front door held implied invitation to enter.) The state cases usually followed the same rule.[3]

Since Illinois v. Rodriguez, 397 U.S. 177 (1990), however, where such consent is allowed by the court upon the basis that the guest or infrequent visitor had "apparent authority" to consent under Illinois v. Rodriguez, supra (as the court here purported to do: Fredericks v. Wright, et al., No. 94-35494. Memorandum Opinion A-8-9), the court further requires that officers make some inquiry into the consenter's authority.

Even when the

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[3] People v. Dent, 371 Ill. 33, 19 N.E.2d 1020 (1939); People v. Wagner, 104 Mich. App. 169, 304 N.W.2d 517 (Mich. Ct. App. 1981); State v. Manns, 220 Neb. 426, 370 N.W.2d 157 (1985); State v. McGovern, 77 Wis.2d 203, 252 N.W.2d 365 (1977); contra, People v. Shaffer, 67 Ill. Dec. 612, 111 Ill. App.3rd 1054, 444 N.E.2d 1096 (Ill. App. Ct. 1982).

> invitation [to enter] is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry. Illinois v. Rodriguez, supra, 397 U.S. at 188.

And, certainly, it is a reasonable inference from this that such "further inquiry" is required where the consenter denies living there or is totally silent about whether he lives there or not, as was the case here. (Fredericks v. Wright, et al., No. 94-35494, Memorandum Opinion A-7.)

All of the Circuit Courts of Appeal which have applied Illinois v. Rodriguez,397 U.S. 177, since its rendition have required such an inquiry where the consenter's identity and/or authority were unclear. United States v. Hall, 979 F.2d 77 (C.A.6 1992); United States v. Brown, 961 F.2d 1039 (C.A.2 1992); United States v. Salinas-Cano, 959 F.2d 861 (C.A.10 1992); United States v. Whitfield, 939 F.2d 1071 (C.A.D.C. 1991). As the court stated in the latter case,

> "[i]t is the government's burden to establish that a third party had authority to consent to a search [or entry to arrest]. [Illinois v. Rodriguez, 497 U.S. at 181.] The

> burden cannot be met if agents, faced with an ambiguous situation, nevertheless proceed without making further inquiry." United States v. Whitfield, supra, 939 F.2d at 1075.[4]

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[4] See, as anticipating the Illinois v. Rodriguez requirements of reasonable inquiry, such earlier Ninth Circuit cases as United States v. Hamilton, 792 F.2d 837 (C.A.9 1986) and United States v. Sledge, 650 F.2d 1075 (C.A. 9 1981), per then Circuit Judge Kennedy. In the present case, the court purported to rely upon both United States v. Hamilton, supra, and United States v. Sledge, supra [Fredericks v. Wright, et al., No. 94-35494 Memorandum Opinion, A-8] but relied upon Thompson's failure to "indicate that he was a guest in this house." This puts the burden of proof upon defendant to show "lack of apparent authority". This is contrary to all known burden of proof requirements as well as the express holding of Illinois v. Rodriguez, supra, that

> [*] burden of establishing * * * common authority [or consent] rests upon the state. 497 U.S. at 181.

United States v. Yarborough, 852 F.2d 1522 (C.A.9 1988), cert. den., 488 U.S. 866 (1988), also relied upon by the court here (Fredericks v. Wright, et al, No. 94-35494, Memorandum Opinion, A-8) was one in which

Indeed, the requirement of an inquiry into the consenter's authority to consent would seem to be implicit in Payton v. New York, 445 U.S. 573 (1980) itself. In Payton, four officers knocked at the door of one Riddick, a suspect in the commission of two armed robberies. Apparently, they had probable cause to arrest, but had no warrant.[5] Riddick's door was answered by his 3-year old son and, with the door opened, officers saw Riddick inside, entered and placed him under arrest. Payton v. New York, 445 U.S. 573 at 579 and 584. The Supreme Court reversed with no particular discussion on that issue.

Professor LaFave discusses this aspect of Payton v. New York as follows:

> In one type of case police entry of the premises is not necessary to determine that the person to be arrested is there, as where the door is already open or if opened by someone else in response to the

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the consenter had actual authority; an actual authority which was clear and unambiguous. Hence, no further inquiry was necessary.

[5] According to Fredericks' Deposition, when Thompson was asked if Officer Burke had a warrant, the officer said, "No. I don't need one." Exhibit A, p.1, to Plaintiffs' Opposition to Defendants' Motion For Summary Judgment.

> police knock, the police see the intended arrest within. If the police then enter in order to make the arrest, this activity falls within the Payton-Steagald [Steagald v. United States, 451 U.S. 204 (1981)][6] warrant requirement." 2 LaFave Search and Seizure 588-89 (1987); emphasis added.[7]

This is the case Professor LaFave has written about and unless "apparent

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[6] Steagald v. United States, supra, involved entry of defendant's premises to search for a person other than the defendant himself and, thus, is not directly germane to the present discussion.

[7] In support of his view that Payton v. New York, supra, requires either a warrant or consent to cross the threshold of a suspect's door, Professor LaFave cites United States v. Johnson, 626 F.2d 753 (C.A.9 1980), aff'd on other grounds, 457 U.S. 537 (1982). But the Ninth Circuit's holding that entry was non-consensual in that case depended upon the fact that Johnson opened his front door only after Secret Service agents had knocked, identifying themselves by fictitious names. The court in this case properly distinguished United States v. Johnson, supra, upon that basis. Fredericks v. Wright, et al., No. 94-35494, Memorandum Opinion A-6, footnote 1.

authority" under Illinois v. Rodriguez, 497 U.S. 177 (1990) as construed in this case is to swallow Payton v. New York, 445 U.S. 573 (1980), as well as its progeny, to say nothing of Illinois v. Rodriguez's own requirement of reasonable inquiry, review should here be granted. Since the burden, here as always, is upon the government to demonstrate the "reasonableness" of the warrantless entry and arrest, it follows that the officers should know why they believed the consenter to have "apparent authority". And where, as here, the consenter's only "apparent authority" derives from (a) his mere presence and (b) his opening of the door, further inquiry should be required. To do otherwise would be to validate any consent (express or implied) if given by any adult[6] on the premises other than a patent trespasser- e.g., one wearing a ski mask, burglar tools dangling from his pockets!

Conclusion

It is fundamental that the state has the burden to show that any entry into the home is "reasonable". Consent satisfies this burden. But if the "apparent authority" of just any old person on the premises is assumed, the Constitutional requirement of "reasonableness" vanishes. Police who rely upon "apparent authority" should be required to rely upon just that - rather than "apparent absence of lack of authority". The shoe should be on the proper foot. The police should know why they are relying on "apparent authority",

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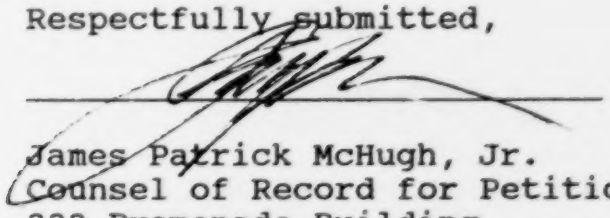
[6] Or, perhaps, any child. See, Payton v. New York, 445 U.S. 573, 579 and 584 (1980).

and they should know why they believe the consenter to have such authority. In a case such as this, they should be required to make some reasonable inquiry into the consenter's relationship with the householder. This is the position taken by the Courts of Appeal for the Second, Sixth, Tenth and District of Columbia Circuits.[7] That position conflicts with the position taken by the Court of Appeals for the Ninth Circuit in this case. Certiorari should be granted to resolve that conflict; ideally, in petitioner's favor.

Respectfully submitted,



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[7] See cases cited at p. 6, supra.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD FREDERICKS, Plaintiff-Appellant, v. GARY WRIGHT; GEORGE BURKE; CITY OF FOREST GROVE; and JOHN DOE, a fictitious person, Defendants-Appellees.	))))))))	NO. 94-35494 D.C. No. CV-93-01294-HJF MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon

Helen J. Frye, District Judge, Presiding

Submitted January 11, 1995**
Before WALLACE, Chief Judge,
HALL and KLEINFELD, Circuit Judges.

Richard Fredericks appeals the district court's grant of summary judgment in favor of the City of Forest Grove and various Forest Grove police officers in his 42 U.S.C. § 1983 and pendent

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* *This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.*

** *The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34 (a); 9th Cir. R. 34-4. Accordingly, Frederick's request for oral argument is denied.*

state law action. In his complaint, Fredericks alleged that the officers violated his fourth amendment rights by arresting him in his home without an arrest warrant. The district court found that the officers were entitled to qualified immunity and that the City of Forest Grove was not liable because there had been no constitutional violation by the defendant officers. The court also found that Fredericks had failed to state a claim under Oregon state tort law for the intentional or reckless infliction of emotional distress. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

On appeal Fredericks contends that the district court (1) improperly granted summary judgment in favor of the defendants on qualified immunity grounds; (2) erred by dismissing the action against the city; and (3) erred by dismissing the pendent state tort law claim.

I

Background

Fredericks is the co-owner of S & J Chevrolet, an automobile dealership in Forest Grove, Oregon. On March 20, 1992, Fredericks and his partner John Schaefers went to the home of Sam Fuller, a former employee of S & J Chevrolet. A physical altercation ensued, and Fuller called the police, reporting that he was being assaulted. Defendants Gary Wright and George Burke, Forest Grove police officers, were dispatched. When Wright and Burke arrived they found Fredericks and Schaefers outside the house and Fuller locked inside. Officer Burke entered the house and spoke with Fuller. He observed that Fuller was frightened, that the interior of the house was in disarray, that Fuller's nose was bleeding, and that his glasses were broken. In response to Officer Burke's questioning, Fuller said that he was afraid to say what happened and did not want to press

charges, but that Burke could contact the Oregon Attorney General's office to find out what was going on. Officer Burke told Fredericks and Schaefers that Fuller did not want to press charges, but only wanted them to leave, which they did.

Shortly thereafter, Burke contacted an investigatory agent at the Oregon Attorney General's Office who told him that S & J Chevrolet was under investigation and opined that Fredericks and Schaefers probably thought that Fuller was cooperating with the investigation.

Burke then spoke again with Fuller, who told Burke that he had changed his mind and wanted to press charges against Fredericks and Schaefers. Fuller also told Burke that Fredericks and Schaefers threatened him, forced open his door, pulled him outside, and hit him in the face.

On the evening of March 21, 1992, Burke and Wright, both in uniform, went to Fredericks's house. Burke knocked on the door. Two different versions of what happened next were offered.

According to Fredericks, he heard a knock on the door and asked his friend, Steve Thompson, to "see who's there." Thompson answered the door. Fredericks then walked to the door and identified himself and was placed under arrest and asked to step outside the house. Neither Fredericks and Thompson recollect that the officers actually entered the house, but they are not certain.

According to Burke, when Thompson answered the door, Burke asked if they could come in. Thompson said they could. Burke did not know Thompson and asked for Fredericks. Before Thompson could respond, Fredericks appeared, and Burke placed him under arrest.

A grand jury subsequently indicted Fredericks and Schaefers for the crimes of burglary in the first degree, assault in the fourth

degree, harassment, and criminal mischief stemming from the events at Fuller's house. Subsequently, Fredericks and Schaefers entered into a civil compromise with Fuller, paying him $9,900, and the criminal charges were dismissed.

II
Analysis

A. Standard of Review

We review a district court's grant of summary judgment de novo. Smith v. Noonan, 992 F.2d 987, 989 (9th Cir. 1993). Summary judgment is appropriate if there is no genuine issue of material facts and the moving party should prevail as a matter of law. See Fed. R. Civ. P. 56(C).

B. Qualified Immunity

Police officials are entitled to qualified immunity in a § 1983 action if their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Act Up!/Portland v. Bagley, 988 F.2d 868, 871 (9th Cir. 1993) (a police officer is immune from suit if "in light of clearly established principles governing the conduct in question, the officer objectively could have believed that his conduct was lawful"). In deciding whether officials are entitled to qualified immunity, we must determine (1) whether the right was clearly established at the time of the alleged violation, and (2) whether, in light of that law, a reasonable official could have believed his conduct to be lawful. Mendoza v. Block, 27 F.3d 1357, 1360 (9th Cir. 1994). Whether the law is "clearly established" is a question of law, which the court of appeals reviews de novo. Elder v. Holloway, 114 S. Ct. 1019, 1023 (1994).

Here, the district court found that while there was dispute as to

the events surrounding the arrest, it did not create a genuine issue of material fact because no violation of a clearly established right occurred under either scenario. We agree.

1. Fredericks's "Doorstep" Version

According to Fredericks's and Thompson's statements, neither officer entered the house. Instead, when Fredericks appeared at the doorway and asked, "how can I help you?," Burke informed him that he was under arrest and asked his to step outside, which Fredericks did.

In Payton v. New York, the Supreme Court stated that "the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" 445 U.S. 573, 585-86 (1980) (quoting United States v. United States District court, 407 U.S. 297, 313 (1972)). Following the reasoning, we have held that it is not a fourth amendment violation for government officers to knock on an individual's door and to arrest the individual when the door is opened, even if the individual is still standing at the doorway. See United States v. Whitten, 706 F.2d 1000, 1015 (9th Cir. 1983) ("a doorway . . . is a public place;" no warrant was required when DEA agents knocked on defendant's door and immediately arrested him when he opened the door); United States v. Botero, 589 F.2d 430, 432 (9th Cir. 1978), cert. denied, 441 U.S. 944 (179); see also United States v. Santana, 427 U.S. 38, 42 (1976) (defendant's doorway was public area, allowing warrantless arrest of defendant standing there); United States v. Berkowitz, 927 F.2d 1376, 1386-87 (7th Cir. 1991) ("Payton prohibits only a warrantless entry into a home, not a policeman's use of his voice to convey a message of arrest from outside the home"); Duncan v. Storie, 869 F.2d 1100, 1101-02 (8th Cir.) ("[t]he doorway of an individual's home or apartment or hotel room may be a public place

for purposes of making a warrantless arrest if the individual has come to stand in the doorway voluntarily"), cert. denied, 493 U.S. 852 (1989); United States v. Mason, 661 F.2d 45, 47 (5th Cir. 1981) (no fourth amendment violation when defendant came to doorway as agents approached the house and was then placed under arrest); United States v. Carrion, 809 F.2d 1120, 1128 (5th Cir. 1987) (no fourth amendment violation when government agents knocked on defendant's door and arrested him when he opened the door).[1/]

Given the state of the law on this issue, the district court correctly concluded that, as of March 1992, it was not clearly established that a warrantless arrest of an individual violates the fourth amendment. See Whitten, 706 F.2d at 1015; Botero, 589 F.2d at 432; Berkowitz, 927 F.2d at 1386-87; Duncan, 869 F.2d at 1101-02. Moreover, the officers could have reasonably believed that their actions were lawful, and thus the officers are entitled to qualified immunity. See Harlow, 457 U.S. at 818; Mendoza, 27 F.3d at 1360.

2. Burke's "Foyer" Version

Under this version, the arrest took place inside the house in the

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1/ This is not a case in which the government agents, either through the use or threat of force or a claim of right, coerced the plaintiff to appear at the doorway or outside the residence in order to make the arrest. Accordingly, Fredericks's reliance on cases involving that type of scenario are not persuasive. See, e.g., United States v. Al-Azzawy, 784 F.2d 890 (9th Cir. 1985) (we held that there can be "constructive entry; and a fourth amendment violation when police surround defendant's home with weapons drawn and order defendant to leave the house and then arrest him outside without a warrant), cert. denied, 476 U.S. 1144 (1986); United States v. Johnson, 626 F.2d 753, 755-56 (9th Cir. 1980) (fourth amendment violation when government agents with weapons drawn used fictitious names to get defendant to open door and subsequently gain access to the premises), aff'd on other grounds, 457 U.S. 537 (1982); see also Elder v. Holloway, 975 F.2d 1388, 1391 (9th Cir. 1991) (without an arrest warrant, police surrounded house and ordered individual out of house to be arrested), rev'd on other grounds, 114 S. Ct. 1019 (1994).

2/ Thompson does not remember being asked to open the door by Fredericks.

foyer. According to Burke, he knocked on the door. Fredericks stated that he asked Thompson to "see who's there." [2/] Thompson answered and Burke asked Thompson if they could come in. Thompson said that they could. Once inside, Burke asked if Fredericks was there, but before Thompson could respond, Fredericks appeared and asked, "how can I help you?" Burke then placed him under arrest.

On appeal, Fredericks contends that Thompson was not his agent and that Thompson's consent, allowing the officers to enter Fredericks's home, was invalid and thus his warrantless arrest inside the residence was nonconsensual and violated the warrant requirement of the fourth amendment. This contention lacks merit.

First, as the district court observed, and Fredericks concedes, consent may be valid under an agency theory. See Stoner v. California, 376 U.S. 483, 488-89 (1964); United States v. Baswell, 792 F.2d 755, 759 (8th 1986) ("consent may be valid under an agency theory of authority").

Here, Fredericks asked Thompson to see who was at the door. In response, Thompson opened the door and consented to the officers' entry into the foyer of the house. Given these circumstances, the district court properly found that Thompson was acting as the agent for Fredericks to the extent he allowed the officers into the foyer of the house. See Stoner, 376 U.S. at 488-89; Baswell, 792 F.2d at 759.

Second, even if Thompson were not acting as Frederick's agent, the fourth amendment is not violated when a law enforcement officer conducts a warrantless entry based on a reasonable belief that the consenting party has the authority to consent. See Illinois v. Rodriguez, 497 U.S. 177, 181 (1990); United States v. Yarbrough, 852 F.2d 1522, 15533 (9th Cir.) ("[e]ven if the consenting third party does not in fact possess actual authority to consent, a warrantless search [and seizure] may be justified when the authorities have reasonable ground to be lieve the consentor has apparent authority to consent") cert. denied,

488 U.S. 866 (1988); United States v. Hamilton, 792 F.2d 837, 841 (9th Cir. 1986); United States v. Sledge, 650 F.2d 1075, 1077-78 (9th Cir. 1981). The pertinent inquiry is whether the facts available at the moment would cause a person of "reasonable caution" to believe that the consenting party had authority over the premises." Illinois, 497 U.S. at 177-78; see also United States v. Salinas-Cano, 959 F.2d 861, 865 (10th Cir. 1992) (validity of government agent's reliance on third party's apparent authority to consent to search or seizure "rests entirely on the reasonableness of the officer's belief").

Here, Thompson appeared at the door in response to Burke's knock, responded affirmatively to the officer's request to come in, and did not indicate that he was a guest in the house. Moreover, upon entering, the officers were immediately met by Fredericks, who did not object to the officers' presence in the foyer, but instead asked, "how can I help you?" Given these circumstances, the officers could have reasonably believed that their entrance into the foyer of the house was permissible. See Illinois, 497 U.S. at 177-78.

Accordingly, we affirm the district court's determination that the officers were entitled to qualified immunity. See Harlow, 457 U.S. at 818; Mendoza, 27 F.3d at 1360; Act Up!/Portland, 988 F.2d at 871.[3/]

3/ To the extent Fredericks argues that, as of March 1992, the law was clearly established that a warrantless arrest within the home violated the fourth amendment, even if the officers had probable cause and consent to enter the home, this argument is without merit.

In Bryant v. United States Treasury Dep't, Secret Serv., we held that the law in this issue "was not clearly established." 903 F.2d 717, 723 (9th Cir. 1990), overruled on other grounds, 502 U.S. 224 (1991). Moreover, we observed that "the relevant case law strongly suggested that the officers could have believed that their warrantless arrest was lawful so long as the had probable cause and consent to enter the residence." Id.; see Payton v. New York, 445 573, 576 (1980) ("the Fourth Amendment . . . prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest") (emphasis added).

C. City of Forest Grove

In Fredericks's reply brief, he concedes that "the city's liability stands or falls on the officer's liability." Appellant's Reply Brief at 6. We agree and affirm the district court's judgment as to the city. See Los Angeles v. Heller, 475 U.S. 796, 799; Forrester v. City of San Diego, 25 F.3d 804, 808 (9th Cir. 1994).

D. Pendent State Tort Claim

The district court found that Fredericks had failed to state a claim for intentional or reckless infliction of emotional distress arising out of the arrest and several other alleged incidents of harassment. [4/]

Under Oregon law, to state a claim for intentional or reckless infliction of emotional distress, the plaintiff must allege that the defendant performed acts which constituted an extraordinary transgression of the bounds of socially tolerable conduct. See Madani v. Kendall Ford, Inc., 818 P.2d 930, 933-34 (Or. 1991); Hammond v. Central Lane Communications Ctr., 816 P.2d 593, 599 (Or. 1991); see also Rice v. Comtek Mfg. of Oregon, Inc., 766 F. Supp. 1539, 1543 (D. Or. 1990) (Oregon courts require "an extremely outrageous transgression of social norms" in order for plaintiff to state a claim for intentional infliction of emotional distress).

Here, none of the incidents alleged by Fredericks taken individually or as a whole constitutes extraordinary transgressions of the bounds of socially tolerable conduct. Moreover, as Fredericks observes in his reply brief, his "arrest by Officer Burke is the central part of his state-law claims of intentional or reckless infliction of emotional distress." Appellant's Reply Brief at 6. Given these circumstances, the district court did not err by dismissing Fredericks's state tort claims.

AFFIRMED.

4/ In his complaint, Fredericks alleged that the defendants harassed him driving by his house, following him through Forest Grove without reasonable suspicion or probable cause, and issuing him a ticket for parking too far from the curb.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1995

RICHARD FREDERICKS,
Petitioner,

v.

GARY WRIGHT; GEORGE BURKE; CITY OF FOREST GROVE and JOHN DOE, a fictitious person.
Respondent.

SUPPLEMENTAL APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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April 1995

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Appendix:

Opinion, Fredericks v. Wright, et al., No. 93-863-FR.....B-1

Explanation of Supplemental Appendix

Herein is the Supplemental Appendix to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. Appendix B is the opinion of the Honorable Helen Frye from the United States District Court for the District of Oregon in the case of Fredericks v. Wright, et al., Case No. 93-863-FR.

Respectfully submitted,

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April 21, 1995.

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CLERK, U.S. DISTRICT COURT
DISTRICT OF OREGON
PORTLAND, OREGON

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOHN SCHAEFERS,
Plaintiff

v.

GARY WRIGHT, GEORGE BURKE, and the CITY OF FOREST GROVE, an Oregon Municipal Corporation, and JOHN DOE, a fictitious person,
Defendants

Civil No. 93-863-FR
(LEAD)

OPINION

RICHARD FREDERICKS,
Plaintiff,

v.

GARY WRIGHT, GEORGE BURKE, and the CITY OF FOREST GROVE, an Oregon Municipal Corporation, and JOHN DOE, a fictitious person,
Defendants.

Civil No. 93-1294-FR

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FRYE, Judge:

The matters before the court are the motions for summary judgment of the defendants, Gary Wright, George Burke and the City of Forest Grove, against the plaintiffs, John Schaefers (#17) and Richard Fredericks (#29).

UNDISPUTED FACTS

On March 20, 1992, the plaintiffs, John Schaefers and Richard Fredericks, went to the residence of Sam Fuller, an employee of the business ow[n]ed by Schaefers and Fredericks, S & J Chevrolet. A physical altercation occurred. Fuller dialed 911 and

reported that he was being assaulted. Defendants Gary Wright and George Burke were dispatched to Fuller's residence. Wright and Burke are police officers employed by the defendant, the City of Forest Grove. When Officers Wright and Burke arrived, they found Schaefers and Fredericks outside of the residence with two large mastiff dogs and Fuller inside of the residence with the door locked.

Officer Burke gained entry to the residence and spoke with Fuller. He observed that Fuller was frightened; that the interior of the house was in disarray; that Fuller's glasses were broken; and that Fuller was bleeding from the nose. In response to Officer Burke's questions, Fuller said that he was afraid to say what had happened, but he told Officer Burke to contact the Attorney General of the State of Oregon if he wanted more information. Fuller also told Officer Burke that he was not interested in pressing charges against Schaefers and Fredericks at that time, so Officer Burke left.

Shortly thereafter, Officer Burke spoke with an investigator from the office of the Attorney General of the State of Oregon. Officer Burke learned from the investigator that Schaefers and Fredericks and their business, S & J Chevrolet, were under investigation by the Attorney General for allegedly engaging in unlawful trade practices. Officer Burke was also told by the investigator that Schaefers and Fredericks probably thought that Fuller was cooperating with the Attorney General in his investigation.

After speaking with the investigator from the Attorney General's office, Officer Burke again talked to Fuller. On this occasion, Fuller told Officer Burke that he had changed his mind and wanted to press charges against Schaefers and Fredericks. Fuller stated that Schaefers and Fredericks had threatened him; had forced the door of his residence open; had pulled him outside; and had hit him on the nose, drawing blood and breaking his glasses.

On the evening of March 21, 1992, the day after the 911 dispatch to Fuller's residence, Officers Burke and Wright and another member of the Forest Grove Police Department, went to Fredericks residence and arrested him without an arrest warrant for the commission of various felonies. The police officers were in uniform.

The facts surrounding the arrest of Fredericks are in dispute.

On the same night, Officers Burke and Wright and another member of the Forest Grove Police Department went to Schaefers' residence. They were in uniform. Officer Burke knocked on the front door of Schaefers' residence, and when Schaefers responded, he was told that he needed to talk to Officer Burke about what had happened the night before. Schaefers told Officer Burke to come into his house. Once inside the house, Officer Burke placed Schaefers under arrest for the crimes of burglary and kidnapping. Officer Burke did not have an arrest warrant.

A Washington County grand jury subsequently indicted Schaefers and Fredericks for the crimes of burglary in the first degree, assault in the fourth degree, harassment, and criminal mischief as a result of the events that had occurred at the home of Sam Fuller. Sometime later, Schaefers and Fredericks entered into a civil compromise with Fuller, paying him $9,900.[1]

Pursuant to 42 U.S.C. § 1983, Schaefers alleges that defendants Wright and Burke and one "John Doe" violated his constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution because they arrested him in his home without an arrest warrant and in the absence of exigent circumstances. Defendant the City of Forest Grove is named as a "proxy defendant on behalf of defendants Wright, Burke and Doe as required by O.R.S. 30.265(1)." Complaint of Schaefers, para. 5.

Fredericks brings his action pursuant to 42 U.S.C. § 1983 and the common law of the State of Oregon. Fredericks alleges that defendants Wright, Burke and one "John Doe" violated his constitutional rights under 42 U.S.C. § 1983 because they arrested him in his home without an arrest warrant and in the absence of exigent circumstances. He alleges that the defendant, the City of

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1/ As a result of the civil compromise, the criminal charges against Schaefers and Fredericks were dismissed. Schaefers and Fredericks, however, are still under investigation by the Attorney General. They are attempting to negotiate a settlement with the Attorney General.

Forest Grove, maintains a policy and procedure of not obtaining warrants for arrests made in the residences of persons suspected of committing crimes.

Fredericks also alleges a state law claim against the three officers for the intentional infliction of emotional distress. Fredericks alleges that the officers "repeatedly stalked the plaintiff without reasonable suspicion or probable cause" and write him a "false" parking ticket. Complaint of Fredericks, para. 17. Fredericks alleges that these acts were extraordinary transgressions of the bounds of socially tolerable conduct. Based on the same facts, Fredericks alleges a claim for the reckless infliction of emotional stress.

APPLICABLE STANDARD

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. p. 56(c). On a motion for summary judgment, it is not the function of this court to weigh the evidence and determine the truth; rather, the court must "determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge...The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 255.

CONTENTIONS OF THE PARTIES

Officers Wright and Burke contend that they are entitled to an order of summary judgment based on the defense of qualified immunity. They argue that Schaefers and Fredericks have not demonstrated that Officers Wright and Burke violated a clearly estab-

lished constitutional principle. The City of Forest Grove argues that because Officers Wright and Burke did not violate any clearly established constitutional principle, Schaefers and Fredericks have no viable claim against the City of Forest Grove. Schaefers and Fredericks argue that when the defendant police officers arrested them, the police officers violated their Fourth Amendment rights.

Furthermore, Officers Wright and Burke argue that Fredericks has failed to state sufficient facts to state a claim for the intentional or reckless infliction of emotional distress because the conduct of the police officers did not exceed the bounds of socially tolerable behavior. Fredericks argues that the facts are sufficient to state a claim.

ANALYSIS AND RULING

1. The Standard for the Defense of Qualified Immunity

The police officers have raised as a defense the issue of qualified immunity. The defense of qualified immunity shields government officials from civil liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). It is the plaintiff's burden to demonstrate that the alleged conduct violated clearly established law. "[T]he plaintiff must show that the particular facts of his case support a claim of clearly established right." Backlund v. Barnhart, 778 F. 2d 1386, 1389 (9th Cir. 1985) (emphasis in original). It is not sufficient that the plaintiff simply identify a clearly established right in the abstract and allege that the defendant has violated it. Anderson v. Creighton, 483 U.S. 635, 639-40 (1987). The plaintiff is required to demonstrate a "substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." Hilliard v. City and County of Denver, 930 F. 2d 1516, 1518 (10th Cir. 1991). The plaintiff must establish that the alleged unlawfulness was "apparent" in the light of preexisting law. Anderson, 483 U.S. at 640. If the plaintiff cannot demonstrate that the law allegedly violated was

clearly established, defendant police officers are entitled to immunity. Id. at 641.

2. The Defense of Qualified Immunity as Applied to the Arrest of Schaefers

Schaefers alleges that the police officers acted unlawfully when they entered his home for the purpose of arresting him without a warrant for arrest. The facts with respect to the arrest of Schaefers are undisputed. They are as follows: Officer Burke knocked on Schaefers front door. Schaefers responded to the knock. Officer Burke told Schaefers, "I'd like to talk to you for a minute. May I come in?" Exhibit A to Defendants' Motion for Summary Judgment Against Plaintiff Schaefers, p. 4. Schaefers said, "Yes." Id. Once inside, Officer Burke placed Schaefers under arrest for the crimes of burglary and kidnapping. Officer Burke did not have a warrant for the arrest of Schaefers.

Schaefers argues that Officer Burke violated clearly established law by gaining entry in this manner. In particular, Schaefers argues that in stating, "I'd like to talk to you for a moment. May I come in?," Officer Burke obtained consent to enter the house by misrepresentation. Schaefers argues that because Officer Burke stated that he would like to "talk" to Schaefers, rather than stating that he would like to "arrest" Schaefers, Officer Burke misrepresented the true nature of his visit, and therefore the consent that Schaefers gave to enter the residence is void ab initio.

In support of this argument, Schaefers relies upon United States v. Bosse, 898 F.2d 113 (9th Cir. 1990) (state agent misrepresented the identity of a federal agent in obtaining consent); United States v. Little, 753 F.2d 1420 (9th Cir. 1984) (entry gained by misrepresentation involving infiltration by an undercover officer of the IRS); United States v. Phillips, 497 F.2d 1131 (9th Cir. 1974) (officers obtained consent by misrepresenting intent to investigate burglary which had not occurred); Johnson v. United States, 333 U.S. 10 (1984) (officers cannot use consent to enter for the purpose of talking to suspect to justify an arrest without probable cause

by using the fruits of subsequent non-consensual search); and Lewis v. United States, 385 U.S. 206 (1966) (an undercover agent may accept invitation to enter a home for the purposes contemplated by the occupants).

None of these cases, however, require the court to conclude that Officer Burke's entry in this case was unconstitutional. Schaefers does not argue that Officer Burke lacked probable cause to arrest him. Although Schaefers argues that entry was gained by misrepresentation, he does not set forth any statement made by Officer Burke or any other officer that amounts to a misrepresentation. Finally, Schaefers fails to cite any case in which a court hold that when a police officer tells a suspect that he wants to "talk" to him, the police officer is misrepresenting the scope, nature or purpose of the investigation that the police officer wants to make.

In United States v. Briley, 726 F.2d 1301 (8th Cir. 1984), the United States Court of Appeals for the Eighth Circuit held that it was not a misrepresentation for police officers to gain entry to a residence by saying they had "important matters to discuss with [defendant]," when in fact they intended to arrest him. Id. at 1304. The court pointed out that "[t]he officers had a right to go about their duties 'without gratuitously advertising [their] every move to anyone [they] might encounter.'" Id. at 1305.

The Briley court also addresses the issue of whether the arrest exceeded the scope of the consent to enter. Like Briley, Schaefers argues here that although the police officers may have been given consent to enter the home, they were never given consent to arrest Schaefers. The Briley court concluded that such an argument is without foundation:

> To adopt Briley's argument would be to say that the police may never validly arrest a person in his or her home based on consent unless the officers specifically ask for permission to enter to arrest the suspect. Such a result cannot be squared with Payton since Payton clearly implies that a consensual entry will justify a warrantless in-home arrest. The Payton Court's primary

concern was with inviolability of a person's home and a warrantless entry.

726 F.2d at 1305 n.2 (emphasis in original).

Based on Briley and the failure of Schaefers to cite any relevant law to the contrary, the court finds that Schaefers has not demonstrated that the law he claims was violated was, in fact, clearly established law; therefore, the defendant police officers are entitled to qualified immunity under the test set out in Harlow.

3. The Defense of Qualified Immunity as Applied to the Arrest of Fredericks

Fredericks also alleges that the police officers acted unlawfully when they entered his home for the purpose of arresting him without a warrant for his arrest. There are two versions of the facts before the court. The conflicting versions of the arrest are not material and do not create a triable issue of fact because, as will be shown below, neither version of the facts defeats the qualified immunity of the police officers.

According to Officer Burke, Steve Thompson, a guest at Fredericks house at the time of his arrest, answered the door in response to Officer Burke's knock on the door. Fredericks testified at deposition that when he heard the knock on his front door, he asked Thompson to answer the door saying to Thompson, "Steve, can you see who's there?' Exhibit A to Defendant's Motion for Summary Judgment Against Plaintiff Fredericks, p. 16.[2] When Thompson reached the door, he saw the police officers in full uniform through the glass. When Thompson opened the door, Officer Burke asked if he could come in, to which Thompson replied, "Yes." Id., Exhibit D, p. 2. After being invited in, Officer Burke asked if Fredericks was at home and, as he was doing so, Fredericks ap-

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2/ A recent affidavit of Fredericks suggests that Thompson, in fact, did not have consent to answer the door. Exhibit B to Plaintiff Fredericks' Concise Statement of Facts in Support of Opposition, pp. 3-4. Fredericks cannot create an issue of fact by impeaching previously given deposition testimony. See Radobenko v. Automated Equip. Corp., 520 F.2d 540 (9th Cir. 1975).

peared. Id. at 2-3.

It is well established that consent may be valid under an agency theory. See United States v. Baswell, 792 F.2d 755, 759 (8th Cir 1986), citing Stoner v. California, 376 U.S. 483, 488-89 (1964). Based on the deposition testimony of Fredericks that he asked Thompson to see who was at the door, the court finds that Thompson was acting as an agent of Fredericks when he answered the knock at the front door of the house and allowed the police officers to enter.

Fredericks, like Schaefers, argues that the police officers exceeded the consent given to them to enter the home when they arrested Fredericks, and that the police officers engaged in a constitutional ruse, misrepresenting the fact that they had come to arrest Fredericks by failing to announce that purpose as their specific purpose for entering the house. In support of these arguments, Fredericks cites the same cases as Schaefers. These cases and the applicable law have been discusses above. Under this version of the facts surrounding the arrest of Fredericks, Fredericks has not demonstrated that any clearly established law was violated. Therefore, the defendant police officers are entitled to qualified immunity under the test set out in Harlow.

In the second version of the facts, Thompson attested that when he opened the front door in response to the knock, one of the police officers asked for Fredericks. Before he could respond, Fredericks walked up to the door saying, "Hi, I'm Mr. Fredericks [sic]." Exhibit F to Defendants' Motion for Summary Judgment Against Plaintiff Fredericks, p. 5. Thompson further attested that while the police officers stood on the front porch, they told Fredericks that he was under arrest. Id. at 6-7.

The defendant police officers contend that they are entitled to qualified immunity even if the arrest occurred while they were on the steps of the house. The police officers argue that a warrantless arrest, without entering the residence of Fredericks, is constitutional. In Payton v. New York, 445 U.S. 573, 585-86 (1980), the United States Supreme Court discusses the Fourth Amendment as

follows:

> As the Court reiterated just a few years ago, the "physical entry of the home is the chief evil against which the working of the Fourth Amendment is directed." And we have long adhered to the view that the warrant procedure minimizes the danger of needless intrusions of that sort. (Citation omitted).

Based on this principle, courts have routinely held that neither Payton nor the United States Constitution prohibit a police officer from standing outside a home, knocking on a door, and arresting on occupant when he opens the door in response to this knock, even if he is still standing in the doorway. See United States v. Whitten, 706 F.2d 1000, 1015 (9th Cir. 1983) (no warrant was required where agents of the DEA knocked on defendant's door and immediately arrested him when he opened it); United States v. Mason, 661 F.2d 45, 47 (5th Cir. 1981) (arrest was held constitutional without a warrant where defendant came to the front door as agents approached the house, and he was arrested in the doorway); and United States v. Carrion, 809 F.2d 1120, 1128 (5th Cir. 1987) (arrest was not a violation of Payton where agents knocked on the door of the defendant's hotel room and arrested him when he opened the door).

In a recent decision on this issue, the United States Court of Appeals for the Seventh Circuit held that "Payton prohibits only a warrantless entry into the home, not a policeman's use of his voice to convey a message of arrest from outside the home." United States v. Berkowitz, 927 F.2d 1376, 1386 (7th Cir. 1991) (emphasis in original). The court also held that an entry by police after the defendant has submitted to the arrest is constitutional:

> When the police assert from outside the home their authority to arrest a person, they have not breached the persons privacy interest in the home. It the person recognizes and submits to that authority, the arrestee, in effect, has forfeited the privacy of his home to a certain extent. At that point, it is not unreasonable

> for the police to enter the home to the extent necessary to complete the arrest. A person who has submitted to the police's authority and stands waiting for the police to take him away can hardly complain when the police enter his home briefly to complete the arrest.

Id. at 1387.

In order to defeat a claim of qualified immunity, Fredericks must establish that the alleged unlawfulness was "apparent" in the light of pre-existing law. Anderson, 483 U.S. at 640. From the Berkowitz case cited above, even if a jury was to accept Fredericks' version of the facts, he has not demonstrated that a clearly established law was violated by his arrest from the doorstep of his residence. Moreover, a reasonable police officer could have believed that the actions he took were lawful under the circumstances. Thus, neither part of the test set out in Harlow has been established by Fredericks, and the police officers are entitled to qualified immunity.

4. The Claim of Schaefers Pursuant to 42 U.S.C. § 1983 Against the City of Forest Grove as a "Proxy Defendant"

Schaefers does not make a independent claim against the City of Forest Grove, naming it only as a "proxy defendant" under Oregon's Tort Claims Act, O.R.S. 30.265(1). Despite the citation to O.R.S. 30.265(1), Schaefers alleges no state law claims in his complaint; his sole theory is based upon 42 U.S.C. § 1983.

Municipal liability in an action brought under 42 U.S.C. § 1983 cannot be premised upon the mere fact that the municipality employed the offending individual. Monell v. Department of Social Servs., 436 U.S. 658, 684 (1978). Because there is no direct allegation against the City of Forest Grove, it is entitled to an order of summary judgment under Monell.

5. The Claim of Fredericks Pursuant to 42 U.S.C. § 1983 Against the City of Forest Grove

In action brought under 42 U.S.C. § 1983, municipalities may be held liable for injuries inflicted pursuant to "government's policy

or custom." Monell, 436 U.S. at 694. To impose liability on a municipality for failing to act to preserve constitutional rights, Fredericks must establish 1) that he possessed a constitutional right of which he was deprived; 2) that the City of Forest Grove had a policy; 3) that this policy amounts to "deliberate indifference" to his constitutional right; and 4) that the policy is the "moving force [behind] the constitutional violation." City of Canton, Ohio v. Harris, 489 U.S. 378, 389 (1989). Based on the foregoing analysis of the claims of Fredericks, the court finds that Fredericks has failed to establish that he was deprived of any constitutional right by the City of Forest Grove. Since the police officers did not violate the constitutional rights of Fredericks, then the City of Forest Grove is entitled to summary judgment. See Los Angeles v. Heller, 475 U.S. 796 (1986).

6. The Claims of Fredericks for the Intentional or Reckless Infliction of Emotional Distress

Fredericks alleges that the defendants intentionally inflicted emotional distress upon hem when they performed the following acts: stalked him without reasonable suspicion or probable cause; wrote a parking ticket citing him for parking too far from the curb; failed to appear at the time set for trial on the parking ticket; regularly drove by his residence; and followed him on one occasion through the City of Forest Grove.

The defendants contend that the allegations made by Fredericks fail to state a claim for the intentional infliction of emotional distress. In order to state a claim for the intentional infliction of emotional distress, a plaintiff must allege as follows: 1) that the defendant intended to inflict upon the plaintiff severe emotional distress; 2) that the acts of the defendant were the cause of the plaintiff's severe emotional distress; and 3) that the acts of the defendant constituted an extraordinary transgression of the bounds of socially tolerable conduct. Sheets v. Knight, 308 Or. 220, 236, 779 P.2d 1000 (1989).

The primary issue in this case is whether Fredericks has sufficiently pled the third prong of the Sheets test. Conduct which

exceeds the bounds of socially tolerable conduct is outrageous conduct. The Oregon courts require "an extremely outrageous transgression of social norms" in order for a plaintiff to state a claim for the intentional infliction of emotional distress. Rice v. Comtek Mfg. of Oregon, Inc., 766 F. Supp. 1539, 1543 (D. Or. 1990). The court cannot find, based upon the allegations made by Fredericks, that the behavior alleged rises to the level of an extraordinary transgression of the bounds of socially tolerable conduct as defined under the laws of the State of Oregon.

Fredericks has also alleged a claim for the reckless infliction of emotional distress. The tort of the reckless infliction of emotional distress allows recovery for severe emotional distress where the behavior directed toward a plaintiff has exceeded the bounds of socially tolerable conduct and there is a special relationship between the parties or a violation of a legally protected interest or known legal right. Hammond v. Central Lane Communications Ctr., 312 Or. 17, 27, 816 P.2d 593 (1991). Because Fredericks has failed to allege facts to support the requirement that the acts of the defendants constituted an extraordinary transgression of the bounds of socially tolerable behavior, he cannot maintain a claim for this tort.

CONCLUSION

The motions of the defendants for summary judgment against Schaefers (#17) and Fredericks (#29) are granted.

DATED this 22nd day of April 1994.

Helen J. Frye
United States District Judge

Supreme Court, U.S.
FILED
MAY 12 1995
CLERK

(3)

No. 94-1791

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1994

RICHARD FREDERICKS,

Petitioner,

v.

GARY WRIGHT; GEORGE BURKE; CITY OF FOREST GROVE and JOHN DOE, a fictitious person.

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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May 1995

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STATEMENT OF THE CASE

Petitioner's statement of facts omits an undisputed fact that was dispositive in the District Court and the Court of Appeals' decisions, *i.e.*, the fact that Fredericks asked his friend, Thompson, to open the door. The opinion of the Court of Appeals sets out the relevant facts as follows:

> On the evening of March 21, 1992, Burke and Wright, both in uniform, went to Fredericks's house. Burke knocked on the door. Two different versions of what happened next were offered.
>
> According to Fredericks, he heard a knock on the door and asked his friend, Steve Thompson, to "see who's there." Thompson answered the door. Fredericks then walked to the door and identified himself and was placed under arrest and asked to step outside the house. Neither Fredericks and *(sic)* Thompson recollect that the officers actually entered the house, but they are not certain.
>
> According to Burke, when Thompson answered the door,

> Burke asked if they could come in. Thompson said they could. Burke did not know Thompson and asked for Fredericks. Before Thompson could respond, Fredericks appeared, and Burke placed him under arrest.

(Pet. at A-3)

REASONS FOR DENYING THE WRIT

Petitioner argues that certiorari should be granted to resolve an issue concerning the conduct of police officers who relied upon "apparent authority" of a person to consent to entry into a home. (Pet. at 4) That issue is not properly before the court in this case. The District Court and the Court of Appeals held that Thompson was acting as Fredericks' agent when he consented to the officers' entry into the foyer of the house. Thompson had actual authority to act on behalf of Fredericks. Thus, the officers were entitled to qualified immunity on that ground.

The District Court's specific finding on the agency issue was as follows:

> Based on the deposition testimony of Fredericks that he asked Thompson to see who was at the door, the court finds that Thompson was acting as an agent of Fredericks when he answered the knock at the front door of the house and allowed the police officers to enter.

(Supp. App. at B-10)

The Court of Appeals affirmed that finding as follows:

> Here, Fredericks asked Thompson to see who was at the door. In response, Thompson opened the door and consented to the officers' entry into the foyer of the house. Given these circumstances, the district court properly found that Thompson was acting as the agent for Fredericks to the extent he allowed the officers into the foyer of the house. (Citations omitted.)

(Pet. at A-7)

This holding was made by the Court of Appeals before it addressed any issue

concerning the reasonableness of the officers' belief that Thompson had authority to consent. The holding that Thompson was Fredericks' agent resolved petitioner's claim that his constitutional rights were violated. The Court of Appeals' further conclusion that the officers had a reasonable belief that Thompson had authority to consent was unnecessary to the resolution of this case and was *dicta*.

Petitioner does not challenge the finding of agency in his petition for certiorari. Any resolution by this court of any issue concerning the officers' actions in response to Thompson's "apparent authority" would have no effect upon this case, because petitioner's constitutional rights were not violated where his agent consented to the officers' entry into petitioner's home.

Petitioner argues that the Court of Appeals' resolution of the "apparent authority" issue is in conflict with decisions of the Second and Sixth Circuit Courts of Appeals. (Pet. at 4) That contention lacks merit for two reasons.

First, the Court of Appeals applied the proper standard in resolving that issue. That is, that the officers could have reasonably believed that their entrance into the foyer of the house was permissible. (Pet. at A-8) Thus, they were entitled to qualified immunity on that ground.

Second, the Court of Appeals issued only an unpublished memorandum opinion. It could not create a conflict with other circuits, because the opinion cannot be cited as authority under the rules of the Ninth Circuit (9th Cir. R. 36-3).

CONCLUSION

The Circuit Court correctly affirmed the holding of the District Court that respondents were entitled to qualified immunity because petitioner's agent lawfully consented to any entry by the police into petitioner's home. Petitioner's only argument in his writ for certiorari concerns alleged improper conduct by the police in a situation involving a person's "apparent authority" to consent. Petitioner's constitutional rights could not have been violated in this case because consent to enter was given through his

agent. Certiorari should be denied in this case.

Respectfully submitted,

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May ____, 1995.

No. 94-1791

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1994

RICHARD FREDERICKS,

Petitioner,

v.

GARY WRIGHT; GEORGE BURKE; CITY OF FOREST GROVE and JOHN DOE, a fictitious person.

Respondents.

CERTIFICATE OF FILING AND SERVICE

I, JANET M. SCHROER, attorney for Respondents herein, filed the above RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT with the Clerk of the Supreme Court of the United States on the _____ day of May, 1995, that it was placed in an envelope properly addressed with prepaid postage thereon and

deposited in the United States Post Office at Portland, Oregon.

I hereby certify that on this _____ day of May, 1995, three copies of the RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI in the above-entitled case were mailed, first class postage prepaid, to James Patrick McHugh, Jr., 421 High Street, Oregon City, OR 97045, counsel for petitioner herein. I further certify that all parties required to be served have been served.

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